NO. 76-678

Supreme Court, U. S.
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In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Oklahoma is not reported but is unofficially reported at 10 FEP Cases 844 (N. D. Okla. 1975) (A. 10-25).[1] The opinion of the United States Court

[1] References to the Appendix are designated as (A. (page)).

of Appeals for the Tenth Circuit is reported at 539 F.2d 1256 (A. 26-36) (10th Cir. 1976). The Order denying the Petition for Rehearing was not reported. (A. 37)

JURISDICTION

The Tenth Circuit Court of Appeals decision was filed on July 22, 1976, and, thereafter, a Petition for Rehearing was filed on August 3, 1976, and denied on August 19, 1976, and the Petition for Certiorari was filed on November 15, 1976.

28 U.S.C. § 1254 (1) is the basis for the jurisdiction of this Court.

QUESTIONS PRESENTED

1) Whether the requirement under 29 U.S.C. § 626(d) that the Notice of Intent to Sue be given within 180 days is jurisdictional so as to bar equitable relief to a claimant under proper circumstances.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626 of the Age Discrimination in Employment Act (29 U.S.C. § 626 (d)) The text of that statute has been set forth by petitioner (p. 3 of petitioner's brief) and is therefore not repeated here.

STATEMENT OF THE CASE

Respondent filed an action in the United States Dis-

trict Court for the Northern District of Oklahoma against her former employer, the Shell Oil Company, under Section 7(b) of the Age Discrimination in Employment Act of 1976 (hereinafter the Act or ADEA,[2] and Section 16(b) of the Fair Labor Standards Act of 1938.[3] Plaintiff charged defendant with certain unlawful employment practices based on age, including specifically the act of discharging her in violation of the ADEA. Accordingly, plaintiff sought an injunction in the District Court which would require the defendant to reinstate her, as well as damages which she had suffered by reason of her unlawful discharge together with costs and attorneys fees.

The United States District Court for the Northern District of Oklahoma held that it lacked subject matter jurisdiction, because plaintiff had not strictly complied with the procedural timetable set out in Section 7(d) (1) of the ADEA with respect to filing a "Notice of Intent to Sue" with the Secretary of Labor "within one hundred and eighty days after the alleged unlawful practice occurred," and dismissed plaintiff's action. In so doing, the District Court also ruled that plaintiff's prompt complaint to the United States Department of Labor, made within

[2] Act of December 6, 1976, Public Law 90-202, 81 Stat. 602, as amended; 29 U.S.C. § 621 *et seq.*

[3] Act of June, 25, 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. § 201 *et seq.* Section 7(b) of the ADEA [29 U.S.C. § 626(b)] incorporates by reference the civil enforcement provisions of the Fair Labor Standards Act, including Section 16(b) of that act [29 U.S.C. 216(b)].

nine days of her discharge, even when considered in conjunction with her subsequent formal notification, neither satisfied nor tolled the ADEA notice requirement on equitable grounds.

On appeal to the Tenth Circuit Court of Appeals, the Tenth Circuit held that while the Notice of Intent to Sue was required, the one hundred and eighty day limitation period within which the Notice of Intent to Sue was required to be filed was subject to equitable tolling and held that plaintiff's actions entitled her to equitable relief.

STATEMENT OF FACTS

Mrs. Anne M. Dartt was employed by the Shell Oil Company at its Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, until July 30, 1973 (A. 4). At the time of her discharge, she was 51 years of age (A. 46). and employed as a Senior Credit Analyst (A. 4).

On August 9, 1973,[4] nine days after her termination, Mrs. Dartt visited the Tulsa, Oklahoma, office of the Wage and Hour Division, U.S. Department of Labor, and spoke with its Assistant Area Director, Mr. J. Dean Speer (A. 42-43), 53). Mrs. Dartt complained that she had been fired by Shell due to her age (A. 5, 58). As she explained to the court below, her belief that she had been unlawfully dis-

[4] The court below, based on the mistaken testimony of Mrs. Dartt (A. 40), used the date September 9, 1973. The correct date is August 9th (A. 50, 53), as the court apparently recognized during the course of the evidentiary hearings (A. 53).

charged was based on a statement made to her by her supervisor that she had "no potential because of (her) age" (A. 46). Mr. Speer told her that, "on the face of it, it appears that you have a right to complain, and I'll investigate, and I will let you know. (A. 43). First, however, because of what Mr. Speer considered to be a good working relationship with the Shell Oil Company (A. 55, 63), he immediately undertook to conciliate the matter (A. 59, 63). Indeed, as he testified, he called Shell "that very afternoon" and informed one of its representatives — a Mr. Frank Thompson — of the receipt of Mrs. Dartt's age discrimination complaint (A. 50). The next day, August 10, this information was relayed by Mr. Thompson to Mr. Kenneth E. Jacobs (A. 50), Shell's Manager for Employee Relations, whose equal employment duties with Shell also involve the ADEA.

On September 4, 1973, Mr. Jacobs addressed a letter to Mr. Speer enclosing some materials he had requested relating to the employment of Mrs. Dartt and all other employees classified as Senior Credit Analysts as of the date of her discharge (A. 77). Mr. Speer continued his conciliation effort by meeting with Mr. Jacobs on October 31, 1973 (A. 77), but, as he testified, he "was unsuccessful. (A. 55). He then assumed an "investigative posture".

In November, 1973, Mr. Speer obtained a promise from Shell that it would "make some internal studies and develop some statistical information" as he had re-

quested, but this promise was never kept (A. 55).

As the Court below found, Mrs. Dartt called Mr. Speer several times to inquire about the status of the matter (A. 43-44). Each time she was informed that she would be notified as soon as any action was taken (A. 43). Unfortunately, however, she was not advised of her private right to bring a civil action under the ADEA or of the 180-day notice requirement during any of her several contacts with Mr. Speer (A. 44). Once such call was made on January 21, 1974 (A. 78); her last call was made on March 1, 1974 (A. 78). Thereafter, on March 5, 1974, Mr. Speer informed Mrs. Dartt by letter that "there will be a delay *in completing* this investigation" and notified her of the private right to sue under the Act (A. 78). Enclosed with the letter was an explanatory pamphlet entitled "Age Discrimination in Employment Act" (A. 78), which states in pertinent part:

> "Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention. This notice must be filed within 180 days of the occurrence of the alleged unlawful practice. * * * The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion. [Wage-Hour Publication No. 1230 at p. 4 (1971)]

At trial, Mrs. Dartt stated that this constituted her first actual knowledge of her right to maintain a private ADEA action and of the Act's 180-day notice requirement (A.

43). Promptly, therefore, upon receipt of the letter and pamphlet, she contacted and retained private counsel (A. 44). On March 14, 1974 (i.e., 216 days after discharge), her attorney mailed a letter to the Labor Department's office in Tulsa, Oklahoma, for the attention of Mr. Speer, giving notice that Mrs. Dartt intended to commence a civil action under the ADEA against the Shell Oil Comapny (A. 7).

Based on this formal notification, and in accordance with internal Labor Department procedures, Mr. Speer "attenipted to reconciliate or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue" (A. 55). Thus, on March 15, 1974, Mr. Speer sent out two letters: one to Mrs. Dartt's attorney, acknowledging receipt of the Notice of Intent to Sue; and the other to Shell's Manager for Employee Relations, informing him of the receipt of Mrs. Dartt's Notice of Intent to Sue (A. 78). Each letter also outlined the Labor Department's procedures for attempting to conciliate and setttle the matter (ibid.). Thereafter, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Shell's Manager for Employee Relations to discuss the Possibility of mediating or settling Mrs. Dartt's age discrimination complaint (A. 78). Again, on May 14, 1974, Mr. Speer talked with Shell's Employee Relations Manager as to the possibility of settling the matter (A. 79). This second conciliation effort also "proved

unsuccessful" (A. 79). Therefore, by letter dated May 16, 1974, Mr. Speer notified Mrs. Dartt's attorney that attempts to conciliate her complaint had been unsuccessful and that she was free to take whatever action she thought advisable (A. 79).

This ADEA action was filed by Mrs. Dartt's attorney on May 21, 1974 (A. 1, 2); that is, more than 60 days after giving formal notice of an intent to sue the Shell Oil Company. The complaint sought an injunction requiring defendant Shell to reinstate plaintiff Dartt in its employ, and the recovery of sums due plaintiff by reason of her unlawful discharge, together with costs and attorney fees (A. 2-6). On June 11, 1974, defendant filed a motion to dismiss for failure to state a cause of action (A. 1,8).

In order to develop the facts necessary to resolve the questions raised by defendant's motion to dismiss, the district court held two evidentiary hearings (A. 11). The principal witnesses were plaintiff Dartt (A. 40-49), defendant's Manager for Employee Relations, Mr. Jacobs (A. 50), and Mr. Speer from the Labor Department (A. 53-67). The latter's testimony was generally limited to questions concerning the timing of Mrs. Dartt's discrimination complaint and her notice of intent to sue. On February 6, 1975, the district court granted defendant's motion to dismisss (A. 10-25).

In dismissing the action, the district court ruled that it lacked subject matter jurisdiction, becuase the plaintiff had

not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA for notifying the Secretary of Labor of an intent to sue "within one hundred and eighty days after the alleged unlawful practice occurred." It also held that timely filing of the required notice was a jurisdictional prerequisite to the maintenance of a private ADEA action (A. 10-25).

The court further ruled that plaintiff's age discrimination complaint — although made to the local Labor Department Wage-Hour office shortly after her discharge — technically did not satisfy the ADEA Section 7(d)(1) requirement that a "notice of intent to sue" be filed with the Secretary of Labor. Describing the pertinent statutory language as clear and unambiguous, the court held that it was without authority to accept a mere complaint in satisfaction of the formal notice mandated by the Act (A. 18).

Finally, the lower court declined to view Mrs. Dartt's formal notification as relating back to the original filing of her complaint. Instead, it construed Section 7(d)(1) so strictly as to defeat any and all of the equitable grounds offered by plaintiff for tolling the 180-day notice requirement. Thus, despite the fact that the defendant — well within the 180-day period — had received actual notice and an opportunity to conciliate the asserted violation, the court ruled that the purposes of the Act had somehow not been satisfied (A. 10-25).

Respondent's Complaint was dismissed by the district

court on February 6, 1975, and respondent thereafter perfected her appeal to the Tenth Circuit Court of Appeals, and on July 22, 1976, that court entered an order reversing the judgment of the district court and holding that plaintiff's actions in attempting to promptly pursue her remedy under the ADEA had resulted in the *de facto* fulfillment of the main purposes of the Act and held the time limitation (180 days) was tolled until the filing of respondent's Notice of Intent to Sue.

ARGUMENT

I.

THE 180-DAY LIMITATION PERIOD CONTAINED IN SECTION 626(d) WITHIN WHICH THE 60-DAY NOTICE OF INTENT TO SUE NOTICE MUST BE GIVEN IS SUBJECT TO EQUITABLE MODIFICATION.

The real question in this case is not whether the 60-day notice of intent to sue is a prerequisite to suit, since all of the cases seem to agree that it is. The real question is whether the 60-day notice must be given within a 180-day limitation.

The Tenth Circuit Court of Appeals below very properly recognized that the 60-day notice was a prerequisite to the right to bring a civil action, but recognized that since the 60-day notice of intent to sue was given within 216 days rather than within 180 days, that the equitable circumstances prevailing in this case required equitable modi-

fication of the 180-day limitation period.

A. The ADEA is a Remedial and Humane Act Which Should be Liberally Construed to Effectuate the Purposes of the Act.

That the ADEA itself recognized that the equitable powers of the Court may be necessary to effectuate the purposes of the Act can hardly be denied in view of the fact that 29 U.S.C. § 626(b) and (c) provided that:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal and equitable relief as will effectuate the purposes of this Act*."

The court took note of these provisions in the case of *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir., 1975); where the Sixth Circuit applied equitable relief because of the fact that the respondent had practiced fraud on the plaintiff in inducing him to give up certain rights under the Act. The Sixth Circuit in *Ott* found no difficulty in tolling the two-year limitation period of the ADEA (Portal to Portal Act, 626 U.S.C.A § 255). There thus appears no logical reason for tolling the two-year statute but refusing to toll the 180-day period.

Certainly we are here concerned with a remedial statute as was recognized in the case of *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1970), and the manner in which statutes of limitations have been applied in dealing with remedial and humane statutes is demonstrated in the case of *Burnett v. New York*

Central R. R. Co., 380 U.S. 424, 13 L.Ed. 2d 941, 85 S.Ct. 1050 (1965), where the court was dealing with the Federal Employer's Liability Act.

The defendant Shell has contended (D.B. 30-31)[3] that the time restriction contained in the statute constitutes a limitation on the right itself, and that it is subject to more strict construction than the ordinary statute of limitations. This is contrary to the holding in *Burnett* where the court stated:

> "The fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled."

While Burnett went on to recognize the policy of repose inherent in statutes of limitations, it recognized that this policy may be outweighed in proper circumstances where the court in dealing with this problem stated:

> "This policy of repose designed to protect defendants is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

The court in *Burnett* further held that in order to determine the Congressional intent it is necessary to examine the purposes and policies underlying the limitational provision, the Act itself and the remedial scheme developed for the enforcement of the rights given by the Act. The court after citing authorities on this question then stated:

> ". . . These authorities indicate that the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances."

[3] References to the Defendant's Brief are designated as (D.B. (page)).

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, the courts have frequently referred to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. *Moses v. Falstaff Brewing Corporation*, (8th Cir.) 525 F.2d 92; *Curry v. Continental Airlines*, (9th Cir.) 513 F.2d 691; *Goger v. H. K. Porter Company, Inc.*, (3rd Cir.) 492 F.2d 13.

In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, the court in dealing with a Title VII time period, held:

> "The *ratio decidendi* in the leading cases dealing with timing requirements, in general, under the Act compels the conclusion that the 90-day requirement (amended in 1972 to 180 days) is not 'jurisdictional' in the sense that complicance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirements should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them, should also be applied here."

Also holding thta equitable consideration will toll the time limitations established by Title VII are *Culpepper v. Reynolds Metals Co.*, (5th Cir.) 421 F.2d 888 and *Antonopulos v. Aerojet-General Corp.*, E.D. Cal. 295 F.Supp. 1390.

Cited, also, in the *Reeb* case were *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), which held that a complaint filed with the EEOC without first filing with the state as required by Title VII could be held in abeyance and considered after the state court had declined to take action, thus indicating the liberal construction of the statute and thus establishing the time limitation for filing a complaint to be directory rather than mandatory. The *Reeb* court went on to point out that remedial legislation, such as Title VII of the Civil Rights Act of 1964, is entitled to the benefit of liberal construction.

In the same vein, the Tenth Circuit Court of Appeals in *Love v. Pullman, supra*, approved liberal construction where the court in considering the procedural technicalities of Title VII state:

> "Such technicalities are particularly inappropriate in the statutory scheme in which laymen unassisted by trained lawyers initiate the process."

In another ADEA casa, *Skoglund v. Singer Co.*, 403 F.Supp. 797 (U.S.D.C. N.H., 1975) the court held that claimant's failure to file a Notice of Intent to Sue within 180 days was not jurisdictional and could be excused on equitable principles. The court there state:

> "Remedial legislation should not be so narrowly read as to preclude achievement of its purpose; form should not be raised over substance.
>
> "Limitations which would take away a right from one

> for whom the statute was enacted have been required to be expressed and not subject to varying interpretations."[6]

The *Skoglund* court pointed out that there was no indication from the words of 29 U.S.C. § 626(d) that the 180-day notification requirement was "jurisdictional" in the sense that compliance with it or lack thereof determines, without regard to other circumstances, the jurisdiction of a federal court. In closing the court stated:

> "As noted above, ADEA is remedial legislation. It is therefore entitled to a broad reading. It creates rights in a class of employees, the elderly employed, and it places a burden on employers to inform that class of their rights."

While as noted by the Tenth Circuit in the opinion below (A. 31) the term "jurisdictional" has been loosely used, several courts while holding that the failure to file within the 180-day period was jurisdictional, have nevertheless recognized equitable principles could apply under proper circumstances. In *Rucker v. Great Scott Supermarket*, 528 F.2d 393 (6th Cir. 1976) the claimant gave the Secretary of Labor only two-days notice of intent to file suit. The court then held that notice of intent to file suit is a jurisdictional prerequisite, but did not hold that the

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[6] *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973) Cf.; *Evans v. Sheraton Park Hotel*, 164 U.S. App. D.C. 86, 503 F.2d 177 (1974); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir., 1974); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

failure to file it within 180 days would require dismissal of the claimant's suit. The settlement thus recognized that equitable principles could apply, but held that the action in question could not be held to be compliance with the statute "absent a showing of special facts warranting granting of equitable relief."

And, in *Hiscott v. General Electric Co.*, 521 F.2d 32 (6th Cir. 1975) the court, once again, recognized that the notice of intent to sue was jurisdictional, but since it was never given, they were not required to determine if the 180-day period within which it was to be given was subject to equitable tolling.

In *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974) the court, once again, loosely used the term "jurisdictional" in speaking of the notice requirement. Once again, the case held that filing the Notice of Intent to Sue is the prerequisite to the right to file any suit under the ADEA. It did not hold that the failure to file it within 180 days, however, was jurisdictional.

In the *Powell* case, the court noted that the claimant was specifically advised eleven days after the act of discrimination to note the specific time limits within which she could file her suit. She was also advised of her rights again some four months later. The Fifth Circuit therefore refused equitable relief.

The Eighth Circuit, in considering whether equitable principles should apply to the ADEA considered this question in *Moss v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975) where the employee was notified on November 12, 1973, that she no longer had a job but was not administratively terminated until November 30, 1973, having not worked after November 16, 1973. In making the determination of when her discharge occurred in applying equitable principles so as to bring her within the statute, the court state:

> "The Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination."[7]

The court went on to point out in *Moses* that the strict interpretation contended for by respondent would not "further some substantial goal of the Age Discrimination Act" and held that the 180-day notice requirement was intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes. The court further held that the failure of the ADEA to define the specific time when an alleged unlawful practice occurs is tantamount to a procedural ambiguity which should be construed in favor of the plaintiff party.

This case bears a striking similarity to the case at bar where plaintiff was discharged on July 31, 1973, (A. 40)

[7] "A procedural requirement of the Act of doubtful meaning in the given case should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act" (id. 914-915).

but received an additional twenty-four weeks wages from which the employer deducted taxes which would have paid her up through December 31, 1973 (A. 48).

B. Plaintiff's Notice Accomplished the Purpose Which the 60-Day Notice of Intent to Sue Was Designed to Do.

At the onset we note that the defendant actually had two notices of plaintiff's complaint. The first was transmitted to them within a few day of plaintiff's termination and the second when plaintiff's formal Notice of Intent to Sue was served upon the Labor Department. In both instances, the Department of Labor attempted to mediate the differences between the parties. Thus, the defendant had two chances to avoid litigation.

The Tenth Circuit in its opinion (A. 35) has noted the two basic purposes behind the 180-day notice requirement, which are:

1. To provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh.
2. To give early notice to the employer of a possible lawsuit, so as to promote both the preservation of the evidence and good faither negotiating on the part of the employer during the conciliation period.

As the Tenth Circuit noted in its opinion (A. 35), both of these purposes were fulfilled in spite of the filing of the Notice of Intent to Sue on the 216th day following plaintiff's termination.

It is settled law that the running of a statutory time limitation will be suspended if "tolling the limitation in a given context is consonant with the legislative scheme. *American Pipe & Construction Co. v. State of Utah*, 414 U.S. 538 (1974). "The basic inquiry is whether Congressional purpose is effectuated by tolling * * * in given circumstances." *Burnett v. New York Central R.R. Co., supra*. "In order to determine Congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself and the remedial scheme developed for the enforcement of the rights given by the Act."(Ibid)"Finally, and perhaps most importantly; (where) the tolling effect (is sought to be) given to (any) timely prior filings "under a particular Act, it is essential that" the prior filings in each case necessarily operated to avoid the evil against which the "time limitation" was designed to protect." *(Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 1723-1724, 44 L.Ed.2d 295, 305-306 (May 19, 1975)

The basic purposes of the 180-limitation period were fully satisfied in the case at bar. Shell received prompt notice of violation asserted by Mrs. Dartt following her discharge on July 31, 1973 where within two weeks of the date of her discharge it knew of her complaint to the Labor Department's locai Wage and Hour office, that she had been discharged in violation of the ADEA. Shell was given every opportunity to effect voluntary compliance through

the conciliation effort of the Labor Department in Tulsa. It is important to note that conciliation was undertaken by the Labor Department, not once, but twice.

Shell had all of the "protection" contemplated by the Act's notice requirement provided in Sec. 7(d). It had, to use the language of the Supreme Court in *Johnson v. Railway Express Agency, supra.*:

> "The opportunity to protect itself against the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from the sudden revival of a claim that long has been allowed to slumber."

It seems evident that in view of the Labor Department's extended efforts to conciliate Mrs. Dartt's claim, the defendant received far more notice of the asserted violation and a far greater opportunity to settle it through informal methods than was ever intended by Congress as a prerequisite to the maintenance of a private ADEA action.

It was the intent of Congress that the responsibility for enforcement vested in the Secretary of Labor by Section 7 be initially and exhaustively directed through informal methods of conciliation, conference and persuasion and formal methods applied only in the ultimate sense. (H.R. Rep. No. 805, 90th Cong., 1st Session 1967) P. 5 reprinted in the 1967 U.S. Code Cong. and Admin. News 2213, 2218. See, also, virtually identical language in S. Rep. No. 723, 90th Cong. 1st Session (1967) at P. 5, re-

printed in 113 Cong. Rec. 31250, column 3 (Nov. 6, 1972) In the instant case, this Congressional directive was followed to the letter.

It is clear from the record, except for the technicality of having in the end a formal "Notice of Intent to Sue," the Labor Department promptly and fully complied with the requirements of Sec. 7(d) in the instant case.

The trial court's view that the humanitarian and remedial purposes of the ADEA are outweighed by the policy of the Act to give employers prompt notice of their status as potential defendants can not be squared with the Supreme Court's statement in *Burnett v. New York Central R.R. Co., supra,* concerning the Federal Employer's Liability Act, that "The humanitarian purpose of the (Act) makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying the statute of limitations is served in doing so." (id. at 434)

The defendant relies heavily on the cases of *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 and *Electrical Workers v. Robbins & Myers, Inc.*, U.S. , 97 S.Ct. 441 (1976), while contending that the pursuit of alternative remedies does not toll a statute of limitations. These cases are easily distinguishable in that the plaintiff's actions in each case did not serve the purpose of the Act. Thus, in *Electrical Workers v. Robbins & Myers, supra,* invocation of the grievance process did not satisfy the policies underlying the statutory limitations period, but, in

fact, the plaintiff was asserting these statutory claims in a different forum and was asserting an independent claim based on a *contract right*. As this court pointed out in the *Electrical Workers* opinion:

> "Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. In the instant case, the grievance alleged only an 'unfair action.' Even if racial discrimination is explicitly discussed, however, the grievance procedure properly involves only *contractual* questions, and would, but fortuitously, implicate the Title VII standards." (*Alexander v. Gardener-Denver Company*, 415 U.S. 436; *Johnson Railway Express Agency, Inc.*, 421 U.S. 454)

And in *Johnson v. Railway Express Agency, Inc.*, *supra*, this court held that the timely filing of a charge with the EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. § 1981. In reaching that conclusion, the court stated:

> "Perhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action as subsequently asserted. This factor was more than a mere abstract or theoretical consideration, because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect."

It is important to note that, by contrast to these

cases, respondent Dartt filed an administrative complaint under the ADEA within nine days of her discharge. (A. 53) Shell received notice of respondent's complaint the same day and a Labor Department representative commenced conciliation efforts under the ADEA almost immediately. Respondent's present suit is based upon the same cause of action as the earlier conciliation efforts, and involves the same allegations. It can thus be readily seen that unlike the cases of *Robbins & Myers* and *Johnson v. Railway Express Agency* that respondent fulfilled the policies and purposes underlying the Notice to Sue provisions of the ADEA. We submit that this was correctly recognized by the Tenth Circuit Court of Appeals below.

C. Private Actions Under the ADEA are Much to be Desired to Effectuate the Overall Scheme and Purpose of the Act.

According to the *amicus curid* brief of the Labor Department complaints filed with the Secretary of Labor in fiscal years 1973, 1974, 1975 and 1976 numbered respectively 2208, 3040, 4117 and 5824, *United States Department of Labor, Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1975*, p. 6 (1976) ("Age Discrimination Report").

From these figures alone, one can readily see that the Secretary of Labor can not possibly process all of the claims that are filed. It is a sad commentary on the Act that through the end of 1975 (according to the Secretary

of Labor's *amicus curiae* brief) more than one-half of all reported private actions under the ADEA have been dismissed by the district courts on procedural grounds. *Age Discrimination Report, supra,* p. 14. Of this, almost one-third of all cases were dismissed, at least in part, because of the failure to strictly comply with the notice provisions of the ADEA. Thus, it is readily apparent that a strict construction of the Act completely defeats the true purpose of the Act. Thus, we have the situation where Congress passed an Act purportedly to remedy age discrimination in employment for the benefit of our aging and senior citizens and where the courts have by their strict construction of the 180-day limitation period almost completely defeated the purposees of the Act and rendered ineffective one of the most important enforcement provisions of the Act.

D. The Legislative History of the Act Indicates That Congress Did Not Intend the Notice to Supervision to Operate as an Inflexible Time Limitation on the Maintenance of Private Enforcement Actions.

In enacting the ADEA, Congress accepted the administration's proposal that complaints of age discrimination in employment, like claims of discrimination covered by Title VII, be dealt with initially with efforts directed toward conciliation. It did, however, refuse to incorporate into the ADEA the post-conciliation enforcement procedures contained in Title VII. 113 Cong. Rec. 2794-2796 (1967). As Congress was concerned that the delays which

have plagued the implementation of Title VII did not occur under the ADEA, it therefore incorporated into the Act many of the enforcement procedures of the Fair Labor Standards Act of 1938. 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, which involved somewhat greater emphasis on relief via the courts than is contemplated by Title VII. E. G., 113 Cong. Rec. 7076 (1967), (remarks of Senator Javits).

The primary reason for incorporating the enforcement procedures of the Fair Labor Standards Act into the ADEA as explained by Senator Javits was to avoid the procedural delays and difficulties being encountered by other discriminitees proceding through the Equal Employment Opportunity Commission and Title VII. Such procedural obstructions, "which plague so many of our agencies such as the EEOC," were left to be "particularly" unfortunate "in the case of older citizens to whom, by definition, relatively few productive years are left." *Statement of Senator Javits at hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare,* U.S. Senate, on S. 830, S. 788, to prohibit age discrimination in employment. 90th Cong., 1st Sess. at 24 (1967); also, 113 Cong. Rec. 7076. Thus, the Bill, is finally an Act that was intended to give aggrieved individuals an easier and more direct access to the courts after the expiration of an initial 60-day period during which the Secretary of Labor is required to attempt settlement of the complaint.

The Senate report indicates that the purpose of the intervening notice of intent to sue "is to allow time for the Secretary to mediate the grievance" and "to provide time for the Secretary, by informal methods, to bring about compliance with the Act." S. Rep. No. 723, 90th Cong., 1st Sess. at 5 (1967); also at 113 Cong. Rec. 31250-31251.

Thus, it is quite evident that the ADEA's 180-day notice provision was adopted as a means of accommodating the incorporated Fair Labor Standards Act and Portal-to-Portal Act provisions to the Title VII concept of initial administrative conciliation efforts. Where notice of intent to sue, like the Title VII charging requirement from which it was copied, "is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge (here, notice) is to trigger the investigatory and conciliatory procedures of the EEOC (here, the Secretary of Labor) once a charge (notice) has been filed, the Commission (the Secretary) carries out its investigatory function and attempts to obtain voluntary compliance with the law." *Sanchez v. Standard Brands, Inc.*, 431 F(2) 455, 466 (C.A. 5th, 1970).

It is thus clear that the purpose of the 180-day notice was to speed up the conciliation and enforcement procedures contemplated by the ADEA and thereby to eliminate the delays which discriminates proceeding under Title VII had encountered in bringing their cases to the courts. This acceleration was to be accomplished by causing complainants to make prompt reports of violations to the Secretary

of Labor so that he could mediate the claims while they were still fresh.

It is therefore fully agreed that filing a Notice of Intent to Sue is, indeed, a jurisdictional prerequisite: i.e., no private ADEA action may be brought if the Secretary of Labor is not first afforded appropriate notice and an opportunity to conciliate asserted violations, and it was so held by the Tenth Circuit Court of Appeals in its opinion below. (539 F(2) 1256) (A. 26-36) It does not automatically follow, however, that the 180-day period for filing the requisite notice should similarly be read as jurisdictional in nature.[8]

The ADEA, unlike Title VII, contains its own express statute of limitations, which is identical in scope to that of the Fair Labor Standards Act. It is therefore unreasonable to assume that Congress intended to condemn the cause of action of an aged worker to a shorter life span than that of other causes of action arising under the Fair Labor Standards Act. (e.g., the so-called "equal pay" provisions which proscribe discrimination in pay based on sex, 29 U.S.C. § 206(d), without saying more than that the

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[8]Thus, see the statement of Labor Department Assistant Area Director Speer that,

> "the department's position was that the 180 days was not jurisdictional." (A. 59) As the Supreme Court has so often stated: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971), involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

older worker must bring his or her cause of action to the attention of the Secretary of Labor within 180 days of the occurrence of the alleged unlawful act. Rather, bearing in mind the Congressional concern for the speedy determination of the rights of older workers, expressed by incorporating the enforcement provision of the Fair Labor Standards Act, it is more in keeping with the intent of the ADEA that the 180-day period be treated as directory in nature. That is, a complainant must show, in the first instance to the Secretary of Labor, and then to the courts, extenuating circumstances which sufficiently justify avoidance of the requirement.

It is therefore submitted that the district court was not automatically and irrevocably divested of subject matter jurisdiction by plaintiff's failure to file a formal Notice of Intent to Sue within 180 days after her discriminatory discharge. Based on the facts established at the evidentiary hearings already held and in light of the ADEA's remedial and humanitarian intent, the reasons offered by plaintiff for her delayed filing were sufficient to toll the 180-day limitation period.

CONCLUSION

The Tenth Circuit Court of Appeals reached the right conclusion in holding that the 180-day period within which to file the 60-day Notice of Intent to Sue was properly tolled by equitable principles. The judgment of the Circuit Court of Appeals should be affirmed.

Respectively submitted,

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APPENDIX A

Age Discrimination Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, as amended; 29 U.S.C. 621 *et seq.*

SEC. 7(b). The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedure provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided:* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

SEC. 7(c). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable lief as will effectuate the purposes of this

Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

SEC. 7(d). No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the the alleged unlawful practice occurred * * *

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

SEC. 7(e). Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

APPENDIX B

Fair Labor Standards Act of 1938,
c. 676, 52 Stat. 1060, as amended;
29 U.S.C. 201 *et seq*.

SEC. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to

become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

APPENDIX C

Portal to Portal Act of 1947, Pub.
L. No. 80-49, 61 State. 84, as amended;
29 U.S.C. 251 *et seq*.

SEC. 6 STATUTE OF LIMITATIONS. — Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unapid minimum liquidated damages, under the Fair Labor Standards Act of 1938, as amended, * * *

(a) if the cause of action accrues on or after the date of the enactment of this Act — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; * * *